UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED; IRWIN R. HOGENAUER; and SELMA WALDMAN, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22631

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable William T. Beeks
District Judge

EUGENE G. CUSHING
United States Attorney

JOHN M. DARRAH
Assistant United States Attorney

1012 U. S. Courthouse
Seattle, Washington 98104

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ISSUES PRESENTED

1. Is RCW 9.27.060(2) constitutional?

2. Is the evidence sufficient to convict the appellants Hogenauer and Gottfried under this ordinance?

3. Were summary contempt proceedings warranted for appellant Hogenauer?

COUNTERSTATEMENT OF THE CASE

The Government accepts appellants' statement of the case with the following exceptions:

The testimony of arresting officers (Tanner Tr. 43, 44, Tripp Tr. 60, 78, Blackwood Tr. 75, Husby Tr. 82-83) and the police inspector in charge (Tr. 31, 34-38) together with pictures entered into evidence (Ex. 4 & 8) show that appellants Gottfried and Hogenauer were assembled with others in blocking the doorway to the Selective Service Office.

SUMMARY OF ARGUMENT

1. (a) Statutes using breach of the peace as a criminal standard have been held unconstitutional only when the State Court interpretation of that standard is so broad as to include constitutionally protected conduct.

   (b) RCW 9.27.060(2) has never been interpreted by the Washington Supreme Court and the Federal Courts are not warranted in presuming that the Washington Courts would place an impermissibly broad construction thereon.

2. Appellant Hogenauer's conduct at the adjournment of court constituted contempt by reason of its obstruction of the administration of justice in the Court's presence.

3. The disruptive and unprecedented conduct of appellant Hogenauer was properly dealt with by the summary contempt procedure of Rule 42(a).

ARGUMENT

I

RCW 9.27.060(2) IS NOT IMPERMISSIBLY BROAD OR VAGUE

A. In considering the constitutionality of a statute involving "breach of the peace" as a standard of conduct, the construction by the State Courts of this phrase is determinative.

Perhaps the best and most recent example of the proposition that the State Court construction of a statute or ordinance governs its constitutional consideration is Shuttlesworth vs. Birmingham, 382 US 87, 86 S.Ct. 211, 15 L.Ed. 2d, 176. In this case a Birmingham ordinance appeared on its face to permit a police officer to determine whether persons might lawfully stand on a sidewalk. However, the Court noted that the Alabama Court of Appeals had authoritatively ruled that the ordinance applied only when a person obstructs free passage on the street or sidewalk and then refuses to obey the officer's command. Said the Court:

> It is our duty, of course, to accept this State judicial construction of the ordinance. Winters v. New York, 33 US 507; U. S. vs. Burnison, 339 US 87; Aero-Mayflower Transit Co., the Board of Railroad Comm'rs, 332 US 495. As so construed, we cannot say that the ordinance is unconsitutional, though it required no great feat of imagination to envisage situations in which such an orainance might be unconstitutionally applied.

In the cases cited by appellant in which the United States Supreme Court holds unconstitutional statutes in some way similar to the unlawful assembly statute at issue here,

the high court has not held that breach of the peace or similar phrases are unconstitutionally broad, but rather that the definitions placed on such phrases by the State Courts make them so.

In Terminiello vs. Chicago, 337 US 1, 69 S. Ct.894,93 L.Ed. 1131, (1948), the defendant had been convicted under a disorderly conduct ordinance of the City of Chicago reading as follows:

> All persons who shall make a aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the City . . .shall be deemed guilty of disorderly conduct . . .

The trial court, as affirmed by the Illinois Supreme Court, charged the jury that breach of the peace constitutes any

> Misbehavior which violates the public peace and decorum . . .

and that the

> Misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.

The United States Supreme Court noted the function which free speech plays in our system of government including inducing unrest, creating dissatisfaction and having unsettling effects on established ideas. Noting the protected place given to free speech by the Constitution, the Supreme Court went on to state:

> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.

In Edwards v. South Carolina, 372 US 229, 9 L.Ed. 2d, 697, 83 S.Ct. 680 (1963), not only was the crime of which the defendants were convicted not to be found in the statute books but the Supreme Court of South Carolina held that it was not susceptible to precise definition. The peace which the defendants breached was defined as:

> . . . the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members. . ..

Said the Supreme Court

> And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

To the extent that Edwards represents the striking down of a criminal standard as being unconstitutional on its face, the Supreme Court states:

> As in the Terminiello case, the courts of South Carolina have defined a criminal offense so as to permit conviction of thepetitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest."

In Cox vs. Louisiana, 379 US 536, 13 L.Ed. 2d, 471, 85 S.Ct. 453 (1965), a similar situation arose. A breach of the peace statute was construed by the Louisiana Supreme Court as meaning:

> to agitate, to arouse from a state of repose, to molest, to interupt, to hinder, to disquiet.

Said the Supreme Court:

> The Louisiana statute, as interpreted by the Louisiana Court, is at least as likely to allow conviction for [illegible] as was the charge of the trial judge in Terminiello.

In the case of Keyton vs. Kentucky, 384 US 195, 16 L.Ed. 2d, 469, 86 S.Ct. 140 (1966), involved a criminal libel statute, which, although unlike the unlawful assembly statute of Washington, was interpreted by the trial court to broaden the standard of breach of the peace. The Kentucky Court of Appeals, although affirming the conviction, eliminated the element of breach of the peace from this crime. The United States Supreme Court held that where an accused is convicted under an unconstitutional standard, an appellate court cannot salvage the conviction by changing the standard to eliminate the unconstitutional features. Thus, the Kentucky conviction was reversed because it still rested upon a definition which was impermissibly broad.

United States vs. Jones, 365 F.2d 675 (2 Cir. 1966), is a case arising much like the case at bar in which the interpretation of a State statute was at issue. Jones and others chained themselves so as to block the three front entrances to the United States Courthouse at Foley Square in New York City. They were charged with violation of Title 18 U.S.C., Section 7 and 13, and Section 722(2) of the New York Penal Law

> [illegible] person who [illegible] to provoke a breach of the peace, or [illegible] a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . .
>
> 2. Acts in such a manner as to annoy, disturb, [illegible] or be offensive to others . . . .

Defendants attacked the statute on the grounds that it was unconstitutionally vague on its face relying on Cox vs. Louisiana, supra. Following the direction of Shuttlesworth vs. Bullingham, supra, the Second Circuit Court of Appeals examined decisions of the New York Court of Appeals construing the statute. From a review of these cases it determined that the statute had not been interpreted so as to sweep within its terms constitutionally protected activity. In affirming the convictions the Court stated at page 678:

> By direct contrast to Cox there is no reason to believe that Section 722(2) as construed by the highest Court of New York State would "allow persons to be punished merely for peacefully expressing unpopular views."

B. Federal Courts will not presume an impermissibly broad construction of a state statute.

As conceded by the appellant on pages 11 and 12 of his brief, the Washington Supreme Court has never had occasion to construe RCW 9.27.060(2).

Last year the Seventh Circuit Court of Appeals had occasion to consider this precise issue in a case quite similar to the instant case. In United States vs. Woodard,

371 F.2d 136 (7 Cir. 1967), the Court reviewed the conviction of persons creating disorder at hearings of the House Un-American Activities Committee in Chicago. Both were charged under the disjunctive Illinois statute, as in Jones, supra, and Section 26-1(a) of Chapter 38 of the Illinois Revised Statutes:

> A person commits disorderly conduct when he knowingly . . . does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace.

The Court found no construction of the statute by any Illinois Court. Said the Court at page 143:

> The defendants' conduct was not constitutionally protected and the statute was properly and narrowly applied. It cannot be contended that the Illinois statute is unconstitutionally infirm for the reason that it may possibly be misapplied to include protected activity. We have no warrant to assume that the Illinois Courts will construe the statute improperly or that they will not interpret the statute as we have done. The State Courts are as firmly bound by the Constitution as the Federal Courts.

With regard to the standard given by the statute, the Court said at page 140-1:

> The Constitution does not require impossible standards of specificity in penal statute. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices' (citation omitted). When measured by this criterion, Section 26-1(a)(1) of the Illinois Disorderly Statute does not offend due process.
>
> . . ."Common sense . . . dictate(s) that . . . conduct is to be adjudged to be disorderly not merely because it offends some supersensitive

or hypercritical individual but because it is, by its nature, of a sort that is a substantial interference with (our old friend) the reasonable man' (citation omitted). In short, we think the Illinois Statute, 'when measured by common understanding and practices' (citation omitted) provided the defendants with adequate warning that their conduct was prohibited."

Appellants at page 12 of their brief urge that the Washington State Statute in question must be read to be impermissibly broad and unconstitutional. It is asserted that this result can be reached by reason of a definition of disturbing the peace found in Smith vs. Drew, 175 Wash. 11, 26 P 2d 1040, (1933). That case is an action for civil damages. The date of decision clearly indicates that the Supreme Court of Washington did not have at that time any instruction from the United States Supreme Court on the Constitution's requirements in this area. Indeed, the case of City of Seattle vs. Drew, 70 Wash. 2d 383, 423 P 2d 522 (1967), cited by appellants, indicates the Washington Supreme Court is fully responsive to the requirements of the Constitution and would not give an impermissibly broad interpretation.

In Ashton, the Supreme Court said:

Conviction for breach of the peace where the offense was imprecisely defined were similarly reversed in Edwards vs. South Carolina. (citation omitted) and Cox vs. Louisiana (citation omitted). These decisions recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a

particular person or a particular group, not an appraisal of the common per se. This criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence' (citation omitted). 384 U.S. at page 200.

Would the Washington Supreme Court in 1968 construe breach of the peace as did its sister courts in South Carolina and Louisiana? Like the Seventh Circuit in Jones, this Court has no warrant to assume that it would.

II.

SUBSTANTIAL PROOF EXISTED THAT APPELLANTS HOGENAUER AND GOTTLIEB WERE ASSEMBLED AT THE TIME OF THE COMMISSION OF THE CRIME

Exhibit 3, being a letter addressed to Draft Board No.3 purportedly signed by appellant Hogenauer stated in part as follows:

> On Tuesday, October 17, 1967, at 10:30 a.m., the Seattle Civil Action Committee will begin interfering with the operation of Draft Board No. 3, King County. Under a group Discipline of Non-violence some participants will obstruct the entrance of your office.

(The receipt of this and other similar letters is explained by Mrs. Conner, Tr. 14-15). That the sit-in proceeded as described in this letter can be seen from the following testimony of Inspector LaPointe:

> I went into the area of the Selective Service Office and was in that Selective Service Office area when a group of people came down the hallway that leads into the Selective Service offices and sat down in this antercom just outside the doorway to the offices and

> ... in such a manner as to block the entrance to the Selective Service Office. (Tr. 31) . . . I went [illegible] seated blocking [illegible] individually and collectively [illegible] sitting on the floor blocking the [illegible] there illegally, that they were [illegible] that they [illegible] Selective Service [illegible] the person in charge there [illegible] removed, that I was now asking them to get up and to leave, and if they refused to leave, that they would be removed. (Tr. 34) . . . I directed the officers who were there with me to remove them. . . . We removed about seven at that time [illegible] seven at that time. . . . I remember Mr. [illegible]. He was asking me to explain why he couldn't be there and he was [illegible]. He said, 'This is [illegible] and I [illegible] be arrested.' (Tr. 35-36) Some of them returned [illegible] a second time, and again were removed. [illegible] came back for a [illegible] time and they were again removed. At that time they were placed under arrest, upon their third appearance, or nearly as I could tell their third appearance. I tried to keep [illegible] of how many times I had seen these people [illegible] on the third time I told them that [illegible] they were under arrest, that they had chosen to [illegible] removed, and they were under arrest [illegible]. (Tr. 37) And I again asked if they [illegible] by walking and when they refused they were taken forcibly. (Tr.38)

At the time Inspector [illegible] spoke of Mr. [illegible], he was requested to identify him in the courtroom. The appellants were dispersed through the crowded courtroom and not sitting at counsel table (Tr. 12) and the witness picked out a man who was not involved in the case at all. Nonetheless, his testimony shows that he maintained his station at the entrance to the Selective Service Office and viewed the entire performance from the time the group first began the sit-in until the last arrest was made and that he direct-

ed [illegible] officers [illegible] appellants.

Under these circumstances as long as there was an initial assembly of persons in the doorway it is not necessary that each individual appellant be shown to have been arrested while seated in the presence of two of his co-appellants. As long as the assembly occurred, it is sufficient that a defendant is arrested while sitting in the doorway whether he is the last one of the seven to be carried out or whether he is the first one to return to the doorway after having been already carried out. Each appellant here was identified as having been arrested while sitting at the doorway during the same period of time.

It is idle for the appellants to argue in their brief at page 18 that the owners of legs visible behind Mr. Hogenauer in Exhibit 8 were not shown to have any purpose in common with this appellant. Their behavior was identical and the intent or purpose, aside from what Mr. Hogenauer may have put in writing (Ex. 3), can only be determined from their actions. In fact, appellants Waldman and Fetter are identifiable as those to whom the legs, clothing, and pocketbook belong in Exhibit 8. Similarly with appellant Gottfried in Exhibit 4.

While Mrs. Gottfried was not identified as appearing in Exhibit 4 her activity is detailed by Officer Husby as follows:

> Well, to begin with I saw her carried out once. I heard the officer give her notice not to come

back in. This was in her presence. She went - - I went back in. She tried to get back in. I went back in and asked the Inspector if it was all right if we let her in and he said yes, so we let her back in again. She went in, in front of 901, sat down across the door with her - - -

Question, what is 901, sir?

Answer: That is the Selective Service place there . . . the Inspector told her that she would have a choice, she could get up and go out, otherwise she was under arrest and we would have to take her out, and she said she understood and she refused to go out. (Tr. 82-83)

III.

APPELLANT HOGENAUER'S CONDUCT AT TIME OF ADJOURNMENT OF COURT AT THE END OF TRIAL CONSTITUTED CONTEMPT OF COURT.

Not only did appellant Hogenauer refuse to rise as acknowledged in appellants' brief but he refused to rise when requested to do so, refused to come forward under his own power, requiring the Marshal to forcibly bring him before the Court, and finally went limp and fell to the floor, lying prostrate as the Court addressed him. See the Certificate of Contempt filed by the Court subsequent to the occurrence of this event.

According to Title 18 U.S.C., Section 401, the Court may punish as contempt:

> Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.

Appellants' brief, referring only to the act of remaining seated, stated:

> It was not an affirmative act of insult to the Court. (Appellants' brief, page 20)

It also argues that since the trial was over and nothing remained but to adjourn Court, the act could not be said to disrupt the hearing or obstruct Court proceedings.

The standard by which contempt is judged is the obstruction of the administration of justice. It is submitted that the preservation of order in the courtroom with a minimum amount of decorum is essential to the administration of justice. Attorneys well know that they must stand when addressing the Court, that they must adopt a certain minimum standard of dress, and that they must abide by certain rules of conduct while present in the courtroom.

While not as familiar as the lawyer with courtroom conduct, a defendant or witness knows that he may not wear a bathing suit, may not speak at any time the spirit moves him, and may not lounge on the benches or sit on the tables. He knows this not because it is written down as a rule but because of his knowledge of the dignity which society has accorded to this branch of the Government. This dignity is achieved in part by promoting respect for the Judge by depersonalizing and impartializing his role. We speak of the Judge as "The Court," thus symbolizing his institutional role.

In the transcript of the proceedings in this matter attached to the Certificate of Contempt it is shown that appellant Hogenauer stated ". . . I don't rise for any man." While the respect that is shown to the Court symbolizes the importance and solemnity of the role given it by society, the court's business must be administrated and carried out by human beings. Whether he intends to withhold respect from the man or the institution, his action is no less a contempt.

Appellants' brief urges that since the proceedings were over and nothing remained but the adjournment of court, no obstruction of justice took place. Would there then have been an obstruction had Mr. Hogenauer failed to rise at the opening of Court? Such an individual act might not be noticed but what of the refusal to rise by a large portion of those in the courtroom who may disagree with the law or the Judge's interpretation of it? Is justice obstructed when a defendant or a witness addresses the Judge by his first name or a nickname, or does the obstruction only come by reason of laughter from the spectators? One can pose any number of situations which, though minor, could disrupt or embarrass. Such considerations must inevitably lead to the conclusion that the decorum of the courtroom is an essential element of the administration of justice, and the trial judge's control of the courtroom extends at the very least to the entire time he is present in the courtroom. Necessity requires that discretion

be reposed in the Court to act in a reasonable manner, as the situation requires. The Congressional enactment and the case law permit this.

When a claim of religious conscience is asserted to support a refusal to stand in the courtroom it will be time to consider case of West Virginia State Board of Education vs. Barnette, 319 US 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1942), as urged by appellants. Persons desiring to inject into court proceedings their own individual stamp of unusual conduct mock the freedom for which the Barnette case stands.

Previous cases in which the contempt power has been exercised because of acts committed in the presence of the court are few and far between. Conduct of defendants and their counsel at Smith Act trials has been held contemptuous by reason of insolent words and actions. e.g., United States vs. Hall, 176 F.2d 163 (2 Cir. 1949), cert. den. 70 S.Ct. 90 (1949), and United States vs. Sacher, 182 F.2d 416, (2 Cir. 1950). The attempt to address the court contrary to the court's order by a narcotics conspiracy defendant, along with other aggravating circumstances, constituted contumacious conduct in United States vs. Gallante, 298 F.2d 72, (2 Cir. 1962). Unspecified open defiance of the trial judge along with other arrogant behavior of a litigant proceeding pro se was held contemptuous in In Re DuBoyce, 241 F.2d 855, (3 Cir. 1957).

These cases, and others of which they appear to be representative, do not involve symbolic acts such as the failure to rise in the case of appellant Hogenauer. It would appear that such conduct has never been attempted in a court before. Appellee's research finds no similar conduct in either the State or Federal system. The fact that the conduct is passive rather than aggressive, as in the other cases, should not be a meaningful distinction. Appellant Hogenauer's act of sitting down in the Selective Service office doorway was none the less obstructive because of his desire to protest the war in Vietnam. Similarly, his acts of sitting, refusing to rise, and falling to the floor were none the less disruptive because of his devotion to some "higher power."

If such conduct is put beyond the reach of the contempt power it would be extremely difficult for a trial judge to maintain dignity in a trial where strong feelings on social issues have arisen.

IV.

SUMMARY-CONTEMPT PROCEEDINGS UNDER RULE 42A WERE WARRANTED FOR APPELLANT HOGENAUER

Rule 42A of the Federal Rules of Criminal Procedure states that:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.

Appellant's brief makes no contention that the rule was not complied with. Rather it makes two arguments.

First, it notes the Supreme Court statement in the case of In Re McConnell, 370 US 230, 82 S. Ct. 1288, 8 L.Ed. 2d 434 (1962), at page 236, that:

> Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent an actual obstruction of justice.

Nothing argued or cited by the brief on this point goes beyond the argument that Hogenauer's behavior did not constitute a contempt of court.

Second, it is argued that the contempt conviction is shown to be faulty by reason of a delay:

> The fact that the alleged contempt occurred on December 26, 1967, and the sentencing was ordered January 19, 1968, (R. 66, 68) is indicative of the absence of any need for swiftness. (Appellant's brief, 23)

The transcript of proceedings at the time of the contempt indicate that the trial court entered sentence immediately in the amount of thirty (30)days. The following day, Mr. Hogenauer was brought before the Court in the presence of his attorneys and the sentence was vacated pending reconsideration at the time scheduled for sentencing in the main criminal proceeding. No prejudice occurred to appellant Hogenauer by this procedure as reconsideration resulted in his sentence being cut in half, and it appears

he makes no objection of prejudice. The argument appears to be that by vacating the sentence and allowing the passage of twenty-three (23) days, the trial judge in some way confesses the insignificance of the contempt.

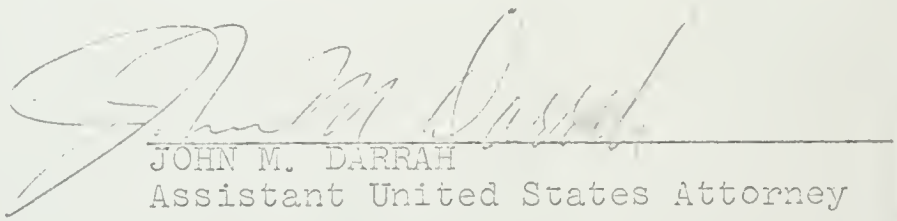
On the contrary, it is to the credit of the Court that he recognized the need for a time for reflection on what was a most unusual and unprecedented action.

CONCLUSION

For the reasons stated above, the Government respectfully urges that the constitutionality of RCW 9.27.060(2) be upheld, that sufficient evidence of the participation of appellants Hogenauer and Gottfried is found in the record, that appellant Hogenauer committed contempt and summary proceedings therefor were properly used, and that the conviction of all defendants should therefore be upheld.

Respectfully submitted,

EUGENE G. CUSHING
United States Attorney



JOHN M. DARRAH
Assistant United States Attorney

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 28 and 32 of the Federal Rules of Appellate Procedure and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN M. DARRAH
Assistant United States Attorney

DATED at Seattle, Washington, this 23d day of July 1968.